A **DATO' DR HENRY OOI KWEE LIM**

v.

MAJLIS PERUBATAN MALAYSIA

B HIGH COURT MALAYA, KUALA LUMPUR
AZIAH ALI J
[ORIGINATING MOTION NO: R1-25-212-2009]
24 DECEMBER 2010

C ***CIVIL PROCEDURE:*** *Affidavits - Affidavit in reply - Application to cross-examine - Whether incumbent on applicant to specifically deny or challenge contents of affidavit - Absence of affidavit in support - Whether application stood unsupported*

D ***CIVIL PROCEDURE:*** *Summons-in-chambers - Application to cross-examine deponent of affidavit - Delay of 13 months in application - Whether reasonable delay - Whether sufficient explanation given - Whether there was special circumstances to allow application*

E The respondent, upon finding the applicant, a medical general practitioner, guilty of a charge of infamous conduct in a professional respect under s. 29(2)(b) of the Medical Act 1971 imposed the punishment of reprimand against the applicant. The applicant filed an appeal against the decision with an affidavit in support contending that the Preliminary Investigation Committee
F and the respondent had breached the rules of natural justice. The respondent filed an affidavit in reply which was affirmed by one Dr Wan Mazlan bin Mohamed Woodjy ('Dr Wan Mazlan'), the respondent's secretary. The applicant however, did not file any affidavit in reply to Dr Wan Mazlan's affidavit. Approximately 13
G months after the filing of Dr Wan Mazlan's affidavit and less than a week before the scheduled hearing of the appeal, the applicant applied to cross-examine Dr Wan Mazlan. The grounds in support of the application were, *inter alia*, that the respondent had not disclosed material facts including the details of advice and/or
H assistance given by the lawyers to the respondent and that the disclosure of such facts was necessary for the fair and just disposal of the appeal. The application was also not supported by any affidavit. Instead the applicant stated that he would rely on the affidavits filed earlier in support of the appeal. The respondent, on
I the other hand, objected to the application on the basis that the application was baseless, misconceived, frivolous and vexatious.

Held (dismissing the application with costs in cause):

(1) It was incumbent on the applicant to specifically deny or challenge the contents of the affidavit in encl. 9 by way of an affidavit in reply. In the absence of such affidavit, the grounds for the application to cross-examine stood unsupported and the averments of Dr Wan Mazlan stood uncontroverted. Hence there was no basis for the applicant to contend that Dr Wan Mazlan had made false statements in his affidavit. Further, the submissions by counsel for the applicant in support of the application were submissions from the Bar and therefore ought not to be accepted by the court. In the circumstances, the applicant had not only failed to identify the issues but had also failed to show whether the disputes as to facts were relevant. (para 18)

(2) Where there is delay in filing an application to cross-examine a deponent that delay would defeat the right to cross-examine. The applicant in the instant case did not offer any explanation for the inordinate and unreasonable delay of 13 months in filing the application. Further, the application to cross-examine was filed at a very late stage of the proceedings *ie*, a week before the appeal was scheduled to be heard and there was no explanation for the delay, Hence, in the absence of any reasonable explanation the applicant had failed to show any special circumstances to warrant the court to exercise its discretion to allow the application. (para 19-22)

(3) On the facts, there was sufficient evidence supported by contemporaneous documents to enable the appeal to be heard properly without the need to cross-examine Dr Wan Mazlan, whose affidavit had long been filed in court. (para 23)

Case(s) referred to:

Abdul Latif Mohamed Ibrahim v. International Factors Leasing Pte Ltd [2001] 2 CLJ 140 CA ***(refd)***

Co-operative Central Bank Ltd & Anor v. Railway Co-operative Multi-Purpose Society Ltd [1999] 2 CLJ 75 CA ***(refd)***

Gomez v. Gomez [1969] 1 LNS 49 HC ***(refd)***

Indrani Rajaratnam & Ors v. Fairview Schools Bhd [2002] 1 CLJ 1 CA ***(refd)***

Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA ***(refd)***

Leisure & Allied Industries Pty Ltd v. Udaria Sdn Bhd [1979] 1 LNS 42 HC ***(refd)***

O'Reilly v. Mackman [1983] 2 AC 237 ***(refd)***
Tetuan Kumar Jaspal Quah & Aishah v. The Co-Operative Central Bank Ltd [2007] 4 CLJ 487 CA ***(refd)***

Legislation referred to:
Legal Profession (Practice and Etiquette) Rules 1978, rr. 3, 4, 5
Medical Act 1971, ss. 29(2)(b), 31
Medical Regulations 1974, regs. 29(1)(a), 32
Rules of the High Court 1980, O. 38 rr. (2), (3)

For the appellant/applicant - Manmohan S Dhillon; M/s PS Ranjan & Co
For the respondent - Jasbeer Singh Kaura (Nur Hakimah Mohamad & Jasmine Lee Kar Lai with him); M/s Jasbeer Nur & Lee

Reported by S Barathi

JUDGMENT

Aziah Ali J:

[1] By way of encl. 21, the applicant applies to cross-examine one Dr Wan Mazlan bin Mohamed Woodjy, ("Dr Wan Mazlan") the respondent's Secretary and the deponent of the respondent's affidavit in reply (encl. 9). I dismissed the application with costs in the cause.

Brief Background

[2] The applicant is a medical general practitioner. By letter dated 23 June 2009, the applicant was notified that pursuant to the inquiry conducted against him arising from a complaint lodged against him by one Madam Ong Sew See, the respondent had found him guilty of one charge of infamous conduct in a professional respect under s. 29(2)(b) of the Medical Act 1971 ("the Act"). The respondent imposed the punishment of reprimand.

[3] On 7 July 2009 the applicant filed this appeal against the decision of the respondent under s. 31 of the Medical Act 1971. The appeal was accompanied by a Certificate of Urgency (encl. 3) for the reason that the applicant is 73 years old.

[4] In the affidavit in support of the appeal the applicant avers amongst others that the Preliminary Investigation Committee ("the Committee") and the respondent have breached the rules of natural justice for a number of reasons as follows:

(a) refusing to disclose to him and his solicitors the legal advice and assistance that they had received during the inquiry and in the course of the inquiry;

(b) that the Committee should have been advised by their solicitor cum legal adviser cum advocate and solicitor that the lawyer who prosecuted the complaint, Mr. Wong, was from the complainant's sister's law firm;

(c) that the Committee and the respondent should have been advised by their solicitor cum legal adviser cum advocate and solicitor that to allow Mr Wong to prosecute the complaint would be in breach of rr. 3, 4 and 5 of the Legal Profession (Practice and Etiquette) Rules 1978 and reg. 29 of the Medical Regulations 1974;

(d) that whenever a legal point was raised, the Chairman of the respondent would ask the applicant and his counsel to leave to enable members of the respondent to seek the advice and assistance from their solicitor cum legal adviser cum advocate and solicitor and after that they would only be told of the decision regarding the legal point without disclosing the legal advice or assistance received;

(e) that such unfair conduct is a breach of reg. 32 of the Medical Regulations 1974 in regard to the role of their solicitor cum legal adviser cum advocate and solicitor;

(f) that his solicitors had written to the respondent to request for the notes of proceedings and details of the legal advice and assistance provided by the solicitor cum legal adviser cum advocate and solicitor.

[5] On 17 September 2009 the respondent filed an affidavit in reply affirmed by Dr Wan Mazlan (encl. 9). In his affidavit Dr Wan Mazlan avers, *inter alia*:

(a) that the decision of the respondent was made after considering the facts of the case and the evidence produced by the applicant and the complainant and there is no error of law and facts in the decision;

(b) the decision was based after considering all the testimony of witnesses and the complainant;

(c) that save that the solicitors for the applicant has written to ask for the notes of proceedings, the rest of the applicant's averments are denied;

(d) that the applicant's averments in paras. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 are the applicant's facts of the case which are denied and these matters had been properly considered by the respondent in arriving at its decision;

(e) that the applicant has no basis to allege that the Committee allowed the complainant's lawyer to prosecute the complaint before the Committee and to allow him to pick and choose the witnesses he intended to call;

(f) that the Committee refused to call other witnesses is denied;

(g) the allegation of breach of natural justice is denied;

(h) that the decision made by the respondent was based not only on the evidence of witnesses and/or the evidence tendered separately but the decision was made after a consideration of all the evidence of the witnesses and the evidence of the complainant;

(i) the allegations made against the Chairman of the respondent is denied and the inquiry was conducted in accordance with the Medical Act 1971 and the Medical Regulations 1974;

(j) that the respondent has supplied all documents and/or notes of proceedings.

The applicant did not file any affidavit in reply to Dr Wan Mazlan's affidavit.

[6] On 15 November 2010, approximately 13 months after Dr Wan Mazlan's affidavit was filed, the applicant filed the application encl. 21 to cross-examine Dr Wan Mazlan on his affidavit. The application is accompanied by a Certificate of Urgency (encl. 22).

[7] By way of encl. 21 the applicant seeks the following orders:

(a) that the Secretary for the respondent, Dr Wan Mazlan bin Mohamed Woodjy, be cross-examined on his affidavit affirmed on 17 September 2009 filed herein;

(b) that Dr Wan Mazlan and the lawyers who gave advice to the respondent be called to give evidence on the advice and/or assistance given by such lawyers to the Council in the absence of and without the knowledge of the appellant; and

(c) that costs be in the cause.

[8] The grounds in support of the application as stated in the summons in chambers are as follows:

(a) that the respondent has not disclosed material facts including the details of the advice and/or assistance given by the lawyers to the respondent; and

(b) that disclosure of such facts is necessary for the fair and just disposal of the appeal.

The applicant did not file any affidavit in support of this application. Instead in the summons in chambers the applicant states that he will rely on the affidavits filed in support of the appeal encl. 1.

[9] The respondent objected to the application *vide* the affidavit affirmed by Dr Wan Mazlan (encl. 25). In his affidavit Dr Wan Mazlan avers as follows:

(a) that this application is tainted by delay;

(b) that the applicant has not filed any affidavit in reply to the affidavit encl. 9 to identify the dispute of material and relevant facts and to specifically challenge the truth of the averments in the said affidavit;

(c) that prayer (2) of the application is contrary to O. 38 r. 2(3), Rules of the High Court 1980 and is for a collateral purpose ie, a 'fishing expedition';

(d) the application is baseless, without merit, frivolous and an abuse of process;

(e) there are no special circumstances on which the court ought to exercise its discretion to allow the application.

The applicant did not file any affidavit in reply.

[10] The written submissions and bundle of authorities filed by counsel for the applicant in respect of the application is marked as encl. 26 and for the respondent are marked as encls. 27, 28 and 29 respectively.

Submissions

[11] Counsel for the applicant submits that the application ought to be allowed because:

(a) Dr Wan Mazlan had made false statements in his affidavit;

(b) there has been procedural unfairness;

(c) there has been a breach of the rules of natural justice.

[12] It is submitted that:

(a) Dr Wan Mazlan had made various false statements which the applicant challenges. It is submitted that where the truth of a deponent's averments are challenged, the court will order cross-examination of the deponent (*Co-operative Central Bank Ltd & Anor v. Railway Co-operative Multi-Purpose Society Ltd* [1999] 2 CLJ 75; *Leisure & Allied Industries Pty Ltd v. Udaria Sdn Bhd* [1979] 1 LNS 42). It is further submitted that where it is fair and proper, the courts have even allowed an application to cross-examine a person other than a deponent (*Gomez v. Gomez* [1969] 1 LNS 49);

(b) there is no record of the legal advice or assistance provided by the legal adviser to the respondent under s. 32 of the Medical Regulations 1974 ("the Regulations"). Thus it is important for Dr Wan Mazlan and the legal adviser to give oral evidence of the details of the legal advice and assistance provided by the said legal adviser;

(c) there is procedural unfairness because the Committee had failed to comply with reg. 29(1)(a) of the Regulations;

(d) that there has been a breach of natural justice because:

(i) the respondent had failed to hear the evidence of witnesses who gave evidence in support of the complaint before the Committee;

(ii) the respondent refused to order in writing to secure the attendance of all persons acquainted with the circumstances;

(iii) there was a delay of approximately 7 1/2 years in proceeding with the complaint;

(iv) the respondent refused to disclose the legal advice and assistance provided by the legal adviser.

Counsel submits that where there is alleged procedural unfairness or a breach of natural justice an application to cross-examine can be allowed (*O'Reilly v. Mackman* [1983] 2 AC 237).

[13] For the respondent, counsel submits that the application is devoid of any good grounds for cross-examination. It is submitted that:

(a) there was inordinate delay in filing the application (*Indrani Rajaratnam & Ors v. Fairview Schools Bhd* [2002] 1 CLJ 1);

(b) the applicant has not filed an affidavit in reply to the affidavit affirmed by Dr Wan Mazlan to show that there is a dispute of material facts and/or to challenge the averments stated in the said affidavit;

(c) the application by an affidavit which specifically challenged or denied the truth of the averments contained in encl. 9 *(Co-operative Central Bank Ltd & Anor v. Railway Co-operative Multi-Purpose Society Ltd, supra)*. Thus there is no basis to cross-examine the deponent of encl. 9;

(d) the applicant has failed to show how the proposed cross-examination would be relevant to the issue which the court is called upon to decide;

(e) the 2nd prayer of encl. 21 is unsustainable in law as it contradicts and is not in compliance with O. 38 r. (2) and (3) of the RHC 1980 which provides that the cross-examination should be confined to "the person making any such affidavit";

(f) the respondent would be exposed to irreparable risk as allowing the application would allow the applicant to unjustly delay proceedings;

(g) the entire process is a "fishing expedition" designed by the applicant to find some way to bolster an already weak and unmeritorious appeal;

(h) the applicant's appeal can be determined based on affidavit evidence without the necessity to cross-examine the deponent as oral evidence would serve no useful purpose as all the material facts and evidence can be found in the respective affidavits filed by both parties;

(i) there are no special circumstances to warrant the court to exercise its discretion to allow the applicant's application;

(j) the application is so widely drafted that it appears to be a "catch all" application based purely on speculation and presumptions not supported by any cogent facts or evidence.

Therefore counsel submits that the application is baseless, misconceived, frivolous and vexatious and ought to be dismissed with costs.

Decision

[14] There are three prime considerations that would influence the court in the exercise of its discretion to allow or disallow cross-examination on affidavit (per Mokhtar Sidin JCA in *Tetuan Kumar Jaspal Quah & Aishah v. The Co-Operative Central Bank Ltd* [2007] 4 CLJ 487):

(a) firstly, the truth of the averment in the affidavit must be challenged or the issues of fact identified;

(b) secondly, cross-examination should only be allowed if the disputed fact is relevant to the issue to be decided and must be limited to that issue only, and

(c) thirdly, cross-examination would not advance the cause of justice and should be refused if there is sufficient affidavit evidence or contemporaneous documents to enable the court to properly decide without the need of cross-examination.

Failure By The Applicant To File Affidavit In Reply And Affidavit In Support Of Application

[15] The applicant has not filed any affidavit in reply to Dr Wan Mazlan's affidavit (encl. 9) to specifically deny or challenge the contents of the affidavit. Neither is there any affidavit in reply to the respondent's affidavit objecting to the application.

[16] The affidavits relied on by the applicant to support this application are the affidavits filed in support of the appeal. The affidavits were filed on 7 July 2009 whereas the affidavit affirmed by Dr Wan Mazlan was filed on 17 September 2009. The affidavits in support of the appeal contain grounds relied on by the applicant to challenge the respondent's decision and do not specifically address the averments in encl. 9. In the affidavits relied on by the applicant there is nothing that amounts to a specific denial or challenge of the truth of the averments in encl. 9.

[17] In the case of *Co-operative Central Bank Ltd & Anor v. Railway Co-operative Multi-Purpose Society Ltd (supra)* Shaik Daud Md Ismail JCA said at p. 79:

> For the court to order cross-examination of the deponent of an affidavit in support, the respondent must challenge the truth of the averments in the affidavit. In the present case, nowhere has the affidavit in support of the application to cross-examine specifically denied or challenged the facts deposed to in the said affidavit.

[18] It is incumbent on the applicant to specifically deny or challenge the contents of the affidavit encl. 9 by way of an affidavit in reply. In the absence of such affidavit, the grounds for the application to cross-examine stands unsupported and the averments of Dr Wan Mazlan stands uncontroverted. Therefore I agree with counsel for the respondent that there is no basis for counsel for the applicant to contend that Dr Wan Mazlan has made false statements in his affidavit. I agree with counsel for the respondent that the submissions made by counsel for the applicant in support of the application are submissions from the Bar and therefore ought not to be accepted by the court. I find that the applicant has not only failed to identify the issues which he maintains cross-examination is necessary but has also failed to show whether the disputes as to facts (if indeed there was any) are relevant *(Indrani Rajaratnam & Ors v. Fairview Schools Bhd, supra)*. Therefore I agree with counsel for the respondent that this application is baseless and lacks merit.

A **Delay**

[19] Counsel for the respondent raised the issue of delay by the applicant in filing this application. There is no explanation offered by the applicant for the inordinate and unreasonable delay of 13 B months. Where there is delay in filing an application to cross-examine a deponent, that delay would defeat the right to cross-examine (see *Indrani Rajaratnam & Ors v. Fairview Schools Bhd, supra*). It is a cardinal principle of law that when a litigant seeks the intervention of the court in a matter that affect his rights, he C must do so timeously. It is also clear that in all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it (*Abdul Latif Mohamed Ibrahim v. International Factors Leasing Pte Ltd* [2001] 2 CLJ 140, CA).

D **[20]** It needs to be mentioned that this appeal was filed on 7 July 2009 accompanied by a Certificate of Urgency (encl. 3) for the reason that the appellant was already 73 years old. This appeal was finally fixed for hearing on 13 July 2010 but parties E applied for a postponement to file further submissions. The court then fixed 7 September 2010 for clarification/decision. However on 7 September 2010 counsel for the appellant applied for this appeal to be heard by another judge on the ground that in another matter (Kuala Lumpur High Court Appeal No. R2-25-28-2005) F the learned judge had made decisions on issues similar to the issues in the present appeal. The appellant's counsel wrote to the Managing Judge to request that this appeal and another appeal be heard by another judge and pursuant to that request this appeal was then transferred to be heard by me.

G **[21]** On 20 October 2010 this appeal was called up for mention and in view of the Certificate of Urgency and considering the applicant's age, this court scheduled this appeal for hearing on 19 November 2010 with the consent of both counsel. Written submissions have been filed by both parties. On that date there H was no indication that the application encl. 21 would be filed. However on 15 November 2010, less than a week before the appeal was scheduled to be heard, the applicant filed this application to cross examine. Due to the filing of encl. 21, the appeal could not proceed on 19 November 2010 thus further I delaying the disposal of the appeal.

[22] The applicant offered no explanation to account why the application has to be made at this late stage of the proceedings. In fact no explanation was offered. In the case of *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396 Gopal Sri Ram JCA (as he then was) said:

> It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt,* though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant.
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> In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion.

I find that there is an inordinate and unreasonable delay of approximately 13 months in filing this application. In the absence of any reasonable explanation I find that the applicant has failed to show any special circumstances to warrant this court to exercise its discretion to allow the application.

[23] I am of the view that there is sufficient affidavit evidence supported by contemporaneous documents to enable the appeal to be heard properly without the need to cross-examine Dr Wan Mazlan whose affidavit has long been filed in court. All the material facts and evidence can be found in the respective affidavits filed by both parties. In *Abdul Latif Mohamed Ibrahim v. International Factors Leasing Pte Ltd* [2001] 2 CLJ 140 the Court of Appeal said:

> It is also settled law that if the issue in the case relates, not to controverted facts appearing on the face of the affidavits but to an issue which must be tried in the action, then Order 38 rule 1 does not apply; see *Abrahams & Co. v. Dunlop Pneumatic Tyre Company & Ors.* [1905] 1 KB 46, 52 where Mathew LJ in considering the provisions of the (English) Order 38 rule 1, which is the same as ours said:

A That applies only to a question of fact which the court or a judge has at the time, jurisdiction to decide, and not to a question to be tried in the action.

[24] For the reasons stated above the application to cross examine is dismissed with costs in the cause.

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